

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ELAINE ARMSTEAD)	
)	
Plaintiff,)	CIVIL ACTION FILE
)	NO. 1:14-CV-586-WSD
v.)	
)	ATLANTA, GEORGIA
ALLSTATE PROPERTY & CASUALTY)	
INSURANCE COMPANY)	
)	
Defendant.)	
_____)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE WILLIAM S. DUFFEY, JR.,
UNITED STATES DISTRICT JUDGE, AND A JURY

CONTEMPT HEARING
Monday, July 11, 2016

APPEARANCES OF COUNSEL:

For the Plaintiff:	THE RUSSELL'S LAW FIRM PLC (By: Sandra Lee Finch)
For the Defendant:	WEBB ZSCHUNKE NEARY & DIKEMAN LLP (By: Marvin Dewayne Dikeman Melissa Cordell Patton)

*Proceedings recorded by mechanical stenography
and computer-aided transcript produced by*
NICHOLAS A. MARRONE, RMR, CRR
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75 Ted Turner Drive, S.W.
Atlanta, GA 30303
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Monday Afternoon Session

July 11, 2016

4:42 p.m.

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P R O C E E D I N G S

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(In open court without a jury present:)

THE COURT: All right. This is a hearing pursuant to my order dated July 1st of 2016. In that I required Ms. Finch to provide certain information about the acquisition of materials that were used during a deposition.

The information that was required to be provided is set out on page 34 of the order, and included information as follows, and the information was required to be provided in a sworn affidavit, stating in detail how and under what circumstances she obtained the photographs of Mr. Gould's office and the Steamatic guide in question, including when the photographs were obtained, who took them, where they were taken, to whom they were distributed, and whether the Steamatic guide photographs had Ms. Finch's letterhead on it, and, if so, how did the letterhead appear on them, and whether Ms. Finch was involved in or knew the circumstances regarding the creation of the photographs.

1 In response to this, Ms. Finch objected to the
2 requirement of the Court, and she was reminded, and I gave
3 her some additional time to respond to the requirement of the
4 order. She did not provide the information as originally
5 required in the July 1st, 2016, order, nor did she provide me
6 information as she was told she was required in the Court's
7 subsequent order.

8 And then, further, during the pretrial conference
9 that we had just a couple of days ago, she told me that she
10 intended to file a response to the order, and she has failed
11 to do that.

12 And so this hearing is for Ms. Finch to show cause
13 why she should not be held in contempt.

14 So you are to show cause why you should not be held
15 in contempt.

16 MS. FINCH: Well, Your Honor, first I believe the
17 Court has the burden to establish contempt by clear and
18 convincing evidence, *Chairs v. Burgess*, 143 F 3d 1432, 1436,
19 Eleventh Circuit 1998. Contempt proceedings are brought to
20 enforce a court order that requires a party to act in some
21 defined manner. A petitioner must first establish by clear
22 and convincing evidence that the alleged contemnor violated a
23 court's earlier order.

24 THE COURT: This is my order that I imposed upon
25 you and that I have told you in a subsequent order that you

1 are required to comply with. The information that was
2 required, as I have told you before, was directly related to
3 my duties in presiding over this case and making evidentiary
4 rulings.

5 You have not provided the information that you have
6 been ordered by the Court twice to provide. And I want to
7 know, one, are you going to provide it now, and if you are
8 not going to provide it, why.

9 MS. FINCH: May I finish, Your Honor?

10 THE COURT: Are you going to provide the
11 information now, and if not --

12 MS. FINCH: The case that I just cited to you holds
13 a *prima facie* case includes validity of the order. The court
14 must show authority under which it has made the order.

15 THE COURT: My authority is that under
16 Supreme Court precedent and circuit precedent, I have the
17 authority for lawyers appearing in litigation before me to
18 maintain the integrity of that process, and my authority and
19 the reason why this order is being issued is because to
20 preside over this case, I require the information that
21 I requested very specifically.

22 That is my authority. If you disagree with it, you
23 can take it up with the Court of Appeals. But that's my
24 authority.

25 MS. FINCH: Okay, Your Honor.

1 Well, first off, I would say that the Court in its
2 order for me to show cause has not been very -- has shown a
3 lack of candor in its order stating that I did not ask for
4 additional time.

5 And I would tender Exhibit 1 as my evidence, which
6 is the transcript of the proceeding which states on page
7 four:

8 *The Court: Well, of course, I didn't know*
9 *that until right now. Nobody contacted us to say*
10 *what your travel arrangements were, that you didn't*
11 *have any access to a computer.*

12 *If what you are asking -- and I haven't*
13 *received anything today yet, but if you are saying*
14 *that you need some additional time to respond, I*
15 *will give that to you.*

16 *Ms. Finch: Well, I would like some additional*
17 *time to respond. But I also have an objection,*
18 *again, because I don't really understand what*
19 *the complaint is or what it is that I am responding*
20 *to.*

21 THE COURT: Ms. Finch, I was at that conference.
22 In fact, that's a conversation between me and you, and I gave
23 you additional time, and during that conference you said that
24 you were going to file a response.

25 It is now Monday, July 11th. You have had an order

1 of the Court to provide specific factual information. You
2 have had lots of time to do that, and you have refused to
3 provide it.

4 MS. FINCH: Your Honor, may I be heard?

5 THE COURT: So tell me what the information is in
6 answer to the questions?

7 MS. FINCH: I would like to. I would like to
8 respond to you.

9 THE COURT: Tell me, first, are you going to comply
10 with the order to provide the information required in my
11 order?

12 MS. FINCH: No, I am not.

13 THE COURT: And why not?

14 MS. FINCH: And I will tender Exhibit 1.

15 THE COURT: And why not?

16 MS. FINCH: Because I don't believe it's a valid
17 order, and I believe the Court is required to have a valid
18 order before it can enforce contempt.

19 There have been three orders in this case dealing
20 with that affidavit.

21 The first one was Document 121 dated July 1st,
22 which came out at 3:45 p.m. on a Friday before a holiday
23 weekend with a due date on Tuesday, July 5th, with no
24 business days in between, which was a lack of due process and
25 a lack of notice.

1 Then in that order the Court said it found Finch's
2 explanations insufficient and evasive, then with no reason
3 whatsoever ordered counsel to provide an affidavit relating
4 to how evidence that this Court already excluded was
5 obtained.

6 There does not appear to be any valid reason for
7 the Court to be asking for that information other than to
8 initiate some sort of sanction or some sort of -- I don't
9 even know what.

10 And the inherent power of the Court addresses
11 conduct within the courtroom. This is conduct that is out of
12 the courtroom and it is not within the Court's inherent
13 power. It doesn't fall under Rule 11. It doesn't fall under
14 Rule 36. It doesn't fall under Rule 37 or Rule 16. It
15 doesn't fall under any rule that this Court has the authority
16 to do anything about.

17 And on top of that, the Court is required, if they
18 want to -- if the Court wants to -- there is just no
19 conceivable reason for the Court to need that information
20 unless the Court is trying to discipline me or sanction me in
21 some way.

22 And if that's the case, the Court is required to go
23 through procedures and provide me with a petition -- an
24 allegation of what conduct the Court complains of that I did
25 or did not do that was wrong, and I am required to have an

1 opportunity to respond to that and have representation and
2 have a hearing. Due process.

3 The second order dated July 6th, Document 127, was
4 due on the same day at 5:00. I got on a plane, I left at
5 four a.m. at my house, Arizona time, and did not arrive to a
6 place where I could even do anything about the order until
7 sometime -- I don't know the exact time. It was at least
8 4:30.

9 I don't remember when I got it. I know I didn't
10 have time to respond to the order. I don't think that that
11 is due process or notice.

12 And inherent power to sanction litigants for bad
13 faith or inherent authority to regulate professional conduct
14 is what -- I mean, you put in the order your reason for
15 asking for it in that order was that you had the inherent
16 authority to manage your docket in the courtroom and the
17 conduct of parties and counsel who litigate before the
18 Court.

19 Well, this had nothing to do with your docket,
20 nothing to do with your courtroom, and nothing to do with
21 conduct of the parties in the court.

22 The other inherent power you mentioned was to
23 sanction litigants for bad faith. Okay. Well, if you are
24 going to sanction me, then I have a right to be told what it
25 is, the conduct I have done that you are going to sanction me

1 for.

2 If you are going to regulate professional conduct,
3 there are rules for that. Those are listed in Local Rule
4 83.1, I believe it is. Local 83.1, Attorney
5 Discipline. There is a whole procedure for it.

6 It says the court has to provide a petition, an
7 allegation against the attorney, and that they have an
8 opportunity to respond. None of that happened.

9 And then the third order which the Court issued on
10 July 7th, the order to show cause, now the reason for the
11 order is for the Court to determine its impact on the
12 evidence that plaintiff stated she intends to offer at
13 trial.

14 Three different orders, three different reasons for
15 why the Court has said they want this information, when it
16 all really comes down to is the Court somehow wants to
17 sanction me or make a judgment of me about conduct that
18 occurred outside of the Court's presence that the Court has
19 no knowledge of.

20 And the Court cannot just take affidavits from
21 people. I am entitled to a hearing on that.

22 Under the inherent power under 18 U.S.C. 401, it's
23 for misbehavior committed in the court's presence or
24 disobedience or resistance to a lawful order. And the key
25 there is lawful order.

1 THE COURT: Anything else?

2 MS. FINCH: I don't believe the order is lawful.

3 An order or command must be sufficiently clear and
4 unequivocal at the time that it is issued. Whether an
5 order -- that's *Traub v. United States*, 232 F 2d 43, D.C.
6 Circuit 1955.

7 Whether an order is clear enough depends on the
8 context in which it is issued and the audience to which it is
9 addressed. *United States v. Robinson*, 922 F 2d 1531,
10 Eleventh Circuit 1991.

11 And in this context where the court is clearly
12 looking for a reason to sanction counsel, counsel would like
13 to know the reasons so that she can respond.

14 I don't believe I am sufficiently noticed as to the
15 need for an affidavit with the changing and evolving orders
16 of the Court. Is it to determine admissibility of evidence?
17 Is it to sanction counsel? Is it to regulate professional
18 conduct? Is it for any of these things?

19 If it's for any of these things, a complaint or
20 petition or fair notice of conduct complained of is required
21 with notice and opportunity to be heard, and none of that has
22 happened.

23 THE COURT: Anything else?

24 MS. FINCH: It is not contempt to disobey, avoid a
25 command date or decreed or warrent issued by a court without

1 jurisdiction of the parties and the subject matter. That is
2 *Western Fruit Growers v. Godfried*, CCA 9, California 1943.

3 It is a weak court that must depend for its
4 strength upon contempt proceedings, and for any abuse of
5 administrative discretion or powers, an equity court has more
6 fitting and effectual restraints and correctives; and,
7 therefore, suggestion that contempt process of court be
8 invoked to compel future admissions of Negro pupils to
9 schools was declined, especially in view of the fact that it
10 appeared that defendant's injunction suit had been warranted
11 in their determinations to refuse admittance in greater
12 number of cases. That's *Jones v. School Board of City of*
13 *Alexandria, Virginia*, 179 F Supp 280.

14 A federal court may punish contemptuous conduct
15 that occurs outside its presence only after giving notice of
16 the essential facts constituting the charged criminal
17 contempt. That's *United States v. Baldwin*, 770 F 2d 1550,
18 Eleventh Circuit 1985. That cases discusses the difference
19 in procedure required for direct and indirect criminal
20 contempt.

21 The defendant is not only entitled to be informed
22 of the nature of the charge against him, but to know that it
23 is a charge and not a civil.

24 A reasonableness -- an order meets the reasonable
25 specificity requirement only if it is a clear, definite and

1 unambiguous order requiring or prohibiting the action in
2 question. *DuPont de Nemours & Company-Benlate Litigation*,
3 99 F 3d 363, Eleventh Circuit.

4 And the reasonableness of an order must be
5 evaluated in the context in which it is entered and the
6 audience to which it is addressed.

7 It's a very high burden for the court to establish
8 contempt under use of inherent power. *Chambers v. NASCO* --
9 that's a case you cited in one of your orders, Your Honor --
10 501 U.S. 32.

11 Should be exercised cautiously and with due regard
12 to constitutional rights. *U.S. v. Moore*.

13 And no willful disobedience.

14 This Court was aware at the time that it issued its
15 order, the last order, that plaintiff was unable to
16 comply. I was expecting there to be another order, but
17 apparently the Court just went on and issued another order.
18 When I said I wanted more time to respond, I would have
19 expected an order that gave me more time to respond.

20 Courts have held that the inherent power to hold an
21 attorney in contempt is to be used in the least restrictive
22 manner to achieve the proposed end. That is a question
23 there: I'm not even sure what the proposed end is.

24 If the Court is truly concerned about an
25 evidentiary ruling, this Court should specify which evidence

1 that it is speaking of and why an affidavit is relevant to
2 that evidence being admitted or denied. The Court
3 specifically references an affidavit on where photographs of
4 Mr. Gould's office and manual were taken, who took them,
5 et cetera, and those exhibits have already been excluded.

6 I would raise the defense of work product
7 doctrine. Attorneys in their investigations have privilege.
8 That's *United States v. Nobles*, 422 U.S. 225, a Supreme Court
9 case.

10 Also *Republic of Ecuador v. Hinchee*, 741 F 3d 1185,
11 Eleventh Circuit case, which said that at its core
12 shelters -- the work product doctrine at its core shelters
13 the mental processes of the attorney.

14 The Supreme Court observed that attorneys often
15 must rely on the assistance of investigators and other agents
16 in the compilation of materials in preparation for
17 trial. The Supreme Court concluded that it is necessary that
18 the work product doctrine protect material prepared by agents
19 for the attorney as well as those prepared by the attorney
20 himself.

21 In addition, to the extent that there is any
22 allegation that I did anything or if there is any proof that
23 I did anything, I would not be required to comment on any of
24 that on my Fifth Amendment rights, and the Georgia Fifth
25 Amendment is much broader than the federal Fifth Amendment

1 and covers anything that will bring ill-repute on a lawyer,
2 not just criminal conduct.

3 And that's all I have.

4 THE COURT: This hearing is conducted because on
5 July 1st of 2016, I ordered you to provide information to me,
6 and that order was entered regarding other motions *in limine*
7 that had been filed with the Court at the time that I ordered
8 you to provide the information that you were ordered to
9 provide. So this is about your failure to provide
10 information in response to an order, it is not about
11 sanctioning conduct outside the Court.

12 And at the time that I entered the order, I had two
13 things before me.

14 I had plaintiff's motion to amend the pretrial
15 order at Docket Entry 118. The motion was filed on July 1st,
16 and it sought to add to the pretrial order at your request
17 Exhibit 199, which was the photo of Steamatic wall depicting
18 certifications. And you wanted to add to the pretrial order
19 Exhibit 202, which was the Steamatic Guide to Restoration
20 Services. Those are both in your motion that were before me
21 at the time that this order was entered.

22 I also had before me on that date objections to
23 Mr. Gould's deposition testimony which centered upon the two
24 things that you wanted to add to the pretrial order, which
25 was specifically the photo of Steamatic wall depicting

1 certifications and the Steamatic Guide to Restoration
2 Services.

3 So at the time that I entered this order and
4 required the information about the acquisition of those,
5 I was specifically considering whether or not to allow
6 amendment to an order, and it had to do specifically as a
7 result of Mr. Gould's deposition testimony and my review of
8 the objections to it. It had to do with whether or not
9 testimony or exhibits were admissible in a matter over which
10 I was presiding.

11 I needed to make rulings on evidentiary matters
12 that were before me in matters that you filed by wanting to
13 add to the pretrial order the two things that are actually
14 in dispute. I needed to know how those were obtained,
15 because if there was lawyer misconduct with respect to that,
16 I might well have and probably would have excluded the
17 information.

18 I simply wanted to know whether or not they were
19 obtained in a way that was through the regular discovery
20 process, in which case it would have been fine, or was there
21 some other way in which there was an election made not to use
22 the Rules of Civil Procedure or other vehicles to obtain the
23 information in a piece of litigation. And if they weren't,
24 I reserved the right to consider whether or not an
25 appropriate ruling would be to exclude the evidence.

1 At the time that I issued my order, I simply asked
2 for factual information that was clearly in your possession
3 relating to two exhibits that you asked me to allow you to
4 bring into the case.

5 Your failure to provide the factual information
6 that was requested was a failure on three occasions. I have
7 given you the further opportunity today to provide the
8 factual information that I need. Because, frankly, in this
9 case I don't know what you are going to try to introduce
10 because it changes from time to time. I think I am required
11 to be prepared for any evidentiary issues so that I have the
12 right information to make a proper ruling.

13 For those reasons I find that you were in bad
14 faith, because you had a specific order to provide
15 information in response to an order that I issued so that
16 I could manage and preside over a piece of litigation
17 assigned to me, and on three occasions, from July 1st until
18 now, not once have you provided the information, and not once
19 have you ever explained why you refuse to provide it, until
20 today when you say you have got Fifth Amendment privileges,
21 you have got due process privileges.

22 But this is your due process hearing, this is your
23 chance to tell me what it is that is your objection and why
24 you didn't provide the information, or you can provide the
25 information.

1 Failing to do either of those things, I find you in
2 contempt.

3 I will issue a written order on this so that you
4 can appeal it to the Eleventh Circuit, and in that order I
5 will decide what is an appropriate sanction.

6 And that's my ruling.

7 MS. FINCH: Your Honor, I would just say that the
8 distinction here lies in -- I'm trying to look at the dates
9 that you just recited, and I seem to recall that you already
10 ruled on the -- that you ruled on the admissibility of the
11 Gould 202 and 191.

12 THE COURT: And that might well influence me on
13 what sanction to impose, but it doesn't absolve you of the
14 responsibility of responding to a valid order of the Court
15 that was lawful.

16 And if you want to submit something in writing now
17 that I have given you my views on this, I will hold off
18 issuing a written order until you do.

19 How much longer to do you need to do that?

20 MS. FINCH: Your Honor, that's fine. I will just
21 appeal it.

22 THE COURT: So how long do you want to be able to
23 respond to this in writing?

24 And if you want an additional hearing with counsel,
25 I am happy to schedule that. Would you like to do that after

1 the case is over?

2 MS. FINCH: I would appreciate anything that the
3 Court is willing to do to allow me to absolve myself in this
4 situation. I think once the Court hears all of the evidence
5 and finds out that Mr. Gould perjured himself in more ways
6 than one --

7 THE COURT: Would you like a hearing, and, if so,
8 when would you want it?

9 MS. FINCH: Well, I am here until the 20th. I fly
10 back to Arizona on the 20th. So when could the Court do a
11 hearing?

12 THE COURT: I will let you know in the morning.

13 MS. FINCH: Thank you.

14 THE COURT: Anything further?

15 MR. DIKEMAN: No, Your Honor.

16 THE COURT: We will be in recess.

17 (Proceedings adjourn at 5:05 p.m.)
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C E R T I F I C A T E

UNITED STATES OF AMERICA :
:
NORTHERN DISTRICT OF GEORGIA :

I, Nicholas A. Marrone, RMR, CRR, Official Court Reporter of the United States District Court for the Northern District of Georgia, do hereby certify that the foregoing 18 pages constitute a true transcript of proceedings had before the said Court, held in the city of Atlanta, Georgia, in the matter therein stated.

In testimony whereof, I hereunto set my hand on this, the 13th day of July, 2016.

/s/ Nicholas A. Marrone

NICHOLAS A. MARRONE, RMR, CRR
Registered Merit Reporter
Certified Realtime Reporter
Official Court Reporter
Northern District of Georgia